

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTIN M. CARVER)	
Claimant)	
VS.)	
)	Docket Nos. 169,565 & 175,483
BEKINS MOVING & STORAGE)	
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE CO.)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant requested a review by the Appeals Board of a Decision on Review (K.S.A. 44-528) entered on October 8, 1996, by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument in Kansas City, Kansas, on March 18, 1997.

APPEARANCES

Claimant appeared by his attorney, James M. Sheeley of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Timothy G. Lutz of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Jeffrey A. Dehon of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and the stipulations as set forth in the original Award dated January 23, 1996, are adopted by the Appeals Board. Additionally, the record contains a transcript of Review and Modification proceedings held before the Administrative Law Judge on September 12, 1996.

ISSUES

The Administrative Law Judge denied claimant's request to review and modify the original Award entered in this matter on January 23, 1996. Claimant framed his issue on appeal in his brief to the Appeals Board claiming the Administrative Law Judge lacked jurisdiction to apply a credit for a previously settled work-related injury to the January 23, 1996, Award pursuant to K.S.A. 44-510a (Ensley).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Administrative Law Judge entered the original Award in this case on January 23, 1996. Claimant alleged in Docket No. 169,565, that he injured his right shoulder in a work-related accident that occurred on January 20, 1992. Claimant claimed in Docket No. 175,483 a re-injury to his left shoulder while working for the respondent on October 3, 1992. Claimant had suffered a previous injury to his left shoulder while working for the respondent on April 17, 1990. That 1990 injury was settled before a Special Administrative Law Judge on April 20, 1992, for a lump sum amount of \$25,508.04 representing an 18 percent functional impairment to claimant's left shoulder.

The Administrative Law Judge in his January 23, 1996, Award found claimant had suffered no additional injury to his left shoulder as a result of the October 3, 1992, accident. The Administrative Law Judge found the medical evidence contained in the record established claimant had sustained a 25 percent permanent functional impairment to his right shoulder as a result of the January 20, 1992, accident. The Administrative Law Judge then combined the 25 percent right shoulder functional impairment with the previously settled 18 percent whole body impairment resulting from the April 17, 1990, left shoulder injury in accordance with the combined value chart contained in the Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). The Administrative Law Judge awarded the claimant permanent partial disability benefits based on a whole body functional impairment of 24 percent. He then gave the respondent a 100 percent credit pursuant to K.S.A. 44-510a (Ensley) for all permanent partial disability weeks that the April 17, 1990, accident overlapped the January 20, 1992, right shoulder accident. Claimant failed to timely appeal the January 23, 1996, Award to the Appeals Board as required by K.S.A. 1995 Supp. 44-551(b)(1). The claimant brought this matter before the Administrative Law Judge on an Application for Review and Modification alleging the Administrative Law Judge lacked authority in the January 23, 1996, Award when he

provided a credit in favor of the respondent and against the claimant for claimant's April 17, 1990, injury.

The Administrative Law Judge heard the application on September 12, 1996. The transcript of the proceeding does not contain any new evidence presented by the claimant. The transcript contains only arguments of the attorneys representing the parties. The Administrative Law Judge denied claimant's request for modification of the original Award dated January 23, 1996, finding that he had not erred when a credit was applied against the Award pursuant to K.S.A. 44-510a (Ensley).

K.S.A. 44-528 provides for review and modification of awards under certain circumstances listed in the statute. One of those circumstances is whether the award was made without authority. Claimant argues that the Administrative Law Judge lacked authority when he found the respondent was entitled to a K.S.A. 44-510a (Ensley) credit because the record did not contain any evidence that the claimant's previous April 17, 1990 left shoulder injury contributed to the present right shoulder injury. Claimant contends the Administrative Law Judge did not have statutory authority without medical evidence contained in the record to apply such a credit.

The Appeals Board disagrees with the claimant's argument and thus affirms the Administrative Law Judge's decision that denied claimant's request to review and modify the January 23, 1996, Award. The Appeals Board concludes the proper procedure the claimant should have followed when he disagreed with the Administrative Law Judge's January 23, 1996, Award was a timely request for review by the Appeals Board pursuant to K.S.A. 1995 Supp. 44-551(b)(1). The purpose of K.S.A. 44-528 is not to provide a procedure to retry workers compensation cases based on the same set of facts and circumstances contained in the original award. An award may be reviewed and modified pursuant to K.S.A. 44-528 where there has to been a change in circumstances. See Gile v. Associated Co., 223 Kan. 739, 576 P.2d 663 (1978). As previously noted, the claimant presented no new evidence to support his Application for Review and Modification. Therefore, the Appeals Board finds the claimant simply made an effort to review and modify the original award because he failed to timely request a review to the Appeals Board after the January 23, 1996 Award was entered.

Furthermore, the Appeals Board concludes the claimant's argument that the Administrative Law Judge lacked jurisdiction to enter the January 23, 1996, Award is without merit. The Appeals Board finds the Administrative Law Judge has been granted the jurisdiction to enter an award based on the evidence presented by the parties pursuant to K.S.A. 44-523. The Appeals Board finds, without deciding whether the Administrative Law Judge's decision was right or wrong in the original Award dated January 23, 1996, that jurisdiction is the power of a court to hear and decide the matter and not whether the court made the right or wrong decision. See Allen v. Craig, 1 Kan. App. 2d. 301, 564 P.2d 552, rev. denied 221 Kan. 757 (1977). Therefore, the Appeals Board finds the Administrative

Law Judge did not exceed his jurisdiction when he decided that a K.S.A. 44-510a (Ensley) credit was appropriate to be applied in the January 23, 1996, Award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Decision on Review (K.S.A. 44-528) of Administrative Law Judge Robert H. Foerschler dated October 8, 1996, should be, and is hereby, affirmed in all respects and the claimant is denied review and modification of the January 23, 1996, Award.

All remaining orders contained in the January 23, 1996, Award remain in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James M. Sheeley, Kansas City, KS
G. Winton Huston, Lee's Summit, MO
Timothy G. Lutz, Overland Park, KS
Jeffrey A. Dehon, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director